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No. 86-473

October Term, 1986

GWALTNEY OF SMITHFIELD, LTD.,
Petitioner,

v.

CHESAPEAKE BAY FOUNDATION, INC.

and

NATURAL RESOURCES DEFENSE COUNCIL,
Respondents.

BRIEF OF *AMICI CURIAE* MID-ATLANTIC LEGAL FOUNDATION, INC. AND CONSUMER ALERT IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

By adopting the citizen suit provisions of the federal Clean Water Act, did Congress intend to empower individual citizens to punish operators of economically and socially productive facilities who, by the exercise of diligence, good faith and state-of-the-art technology, have accomplished compliance with the permit provisions of the Act?

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INTERESTS OF *AMICI*

Pursuant to the Court's Rule 42, Mid-Atlantic Legal Foundation, Inc. and Consumer Alert hereby move the Court for leave to file the attached brief as *amici curiae*. Consent was secured from counsel for all parties. Copies of the letters of consent have been filed with the Court.

Mid-Atlantic Legal Foundation, Inc., is a non-profit, tax-exempt corporation organized and existing under the laws of Pennsylvania. It is a law firm which seeks to present balanced articulation of the public interest in matters of broad impact such as the instant case.

Consumer Alert is a non-profit corporation organized and existing under the laws of the District of Columbia. It is a nationwide organization composed of over 6,000 members of whom approximately 160 are residents of Virginia. Consumer Alert engages in the study and dissemination of information on problems and issues affecting American consumers. Its principal objective is to ensure fair and fully expositive presentations of matters affecting the public interest.

STATEMENT OF THE CASE

For the sake of brevity *amici* do not separately set forth their statement of the case but adopt that of petitioner.

Amici do set forth certain key facts and the issues presented by those facts to the courts below and here.

(a) *Key Facts*

October 27, 1981	Petitioner acquires existing operating facility and shortly thereafter learns of permit exceedences.
October 1982	Interrelated chlorine/fecal coliform problem solved.
October 1983	State-of-the-art waste water treatment facility in place and debugging.
Winter-Spring 1983-1984	Isolated start-up exceedences only.
May 15, 1984	Last nitrogen exceedence recorded.
June 15, 1984	Citizen suit commenced.

From May 15, 1984 to the present, a period of two and three-quarter years, no exceedences have occurred, save one attributable to an Act of God.

(b) *The Issue*

The issue as perceived and defined by the courts below was whether a continuing violation is necessary to confer subject matter jurisdiction over citizen suits seeking penalties for wholly past violations.

Amici suggest that the issue should be defined differently: Did Congress intend to confer subject matter jurisdiction over suits by individual citizens which seek penalties for wholly past violations which occurred in a period during which the operator

1. acted in good faith,
2. with reasonable diligence,
3. solved permit problems,
4. employed state-of-the art technology in the process, and
5. accomplished full, effective, long-term compliance with its permits.

ARGUMENT

Amici respectfully argue that this court should answer no to the issue as framed by *amici*, under precedent of this Court, under proper principles of statutory construction, and as a matter of sound judicial policy.

I

Precedent

This Court has already recognized and pronounced that the Act allows suits by private citizens but authorizes only prospective relief. [*Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1, 6, (1981)].

The Court in *Sea Clammers* further recited that the citizen suit provisions authorize private persons to sue for injunctions to enforce the Act. (*Id.*, 453 U.S., at 14).

The Court further acknowledged that in a proper injunction case, the district court may order civil penalties payable to the government. (*Sea Clammers*, n. 25).

As the Court's discussion indicated, the existence of a legitimate need for injunction in order to enforce the Act is the jurisdictional predicate of an action in which civil penalties may be added.[1]

II

Statutory Construction

A. "To be in violation"

1. *Statutory Language*

The statutory language is clear. A citizen suit may be brought only if the defendant is alleged *to be* in violation of an effluent standard or limitation. [Clean Water Act, Section 505(a), 33 U.S.C., Section 1365(a), hereinafter cited as Section 505(a)].

If Congress intended district courts to exercise jurisdiction over wholly past violations, it could easily have drafted "is alleged to be or to have been in violation." It did not do so.

---

1. To note the harmony of statutory reading between Congress and this Court, please see citation to legislative history of citizen suit purposes at 7, *infra*.

2. *Legislative History*

Failing to find "have been" in the statute, the Court below cited language used by Senator Muskie that a suit might be brought " 'for an appropriate remedy in the case of any person who is alleged to be, or to have been, in violation, whether the violation be a continuous one, or an occasional or sporadic one.' 118 Cong. Rec. 33700 (1972)." (791 F.2d 304, 311-12).

That reliance is wholly misplaced, however, and in any event misreads Senator Muskie's language.

(a) The quoted "have been" language was written. If "to be" in the statute were meant to include "have been," the statute could have been so drafted as it was in Sen. Muskie's written discussion.

(b) In any event, however, the "have been" phrase did not address civil penalties for wholly past violations as are presented by this case. Mr. Muskie was simply explaining that "an appropriate remedy", injunctive relief, might be sought in a proper case notwithstanding the sixty day notice period placed in the bill by the House conferees.

(c) Mr. Muskie meant what he said, *i.e.*, that injunctive relief might continue to be the subject of a legitimate citizen action whether the violation were "continuous," "occasional," "sporadic," or "intermittent," and that an injunction might issue to order the cessation of an outfall's violation whether the outfall was continuously freeflowing, or the producer of violations recurring in varying the lengths of time.

Whether the violation is less than continuous or continuous, it must be ongoing in order to give rise to a proper case to enforce the statute.

(d) Mr. Muskie's concern with technologically unremedied violations of outfalls less than continuous and the meaning of such words as "intermittant" is further clarifed by his discussion of the Administrator's responsibilities:

> The Administrator must issue an abatement order whenever there is a violation of the terms or conditions of a permit, including the effluent limitations, time schedules, and monitoring requirements. Should he fail to issue an order, a citizen suit may be brought against him to direct the issuance of such an order. The Administrator's authority is not limited to those cases in which there is a continuing violation. Any discharge, intermittent or continuous, which the administrator finds violates the terms of the permit, is to be enforced. The conferees expect that the Administrator will act as aggressively against those violations which only intermittently occur as he will act against those violations which occur on a continuous basis. Failure to take this kind of effective action will permit intermittent dumping of waste with impunity. Citizen suits can be brought to enforce against both continuous and intermittent violations.

118 Cong. Rec. 33693 (1972).

B. Jurisdictional Predicate

1. *Statutory Language*

That an unremedied violative discharge is the jurisdictional predicate for a citizen suit under Section 505 may be seen from simple application of plain English and rules of grammar.

The firs: paragraph of Section 505 states that a citizen suit may be brought against any person alleged to be in violation of (A) an effluent standard *or* limitation; *or* (*B*) an order, *or* against the Administrator to force him to act.

The second paragraph recites, in parallel, that district courts will have jurisdiction to enforce such a standard *or* limitation *or* such an order *or* to order the

Administrator to act *and* to apply any appropriate civil penalties.[2]

The jurisdictional predicate is an offending discharge in need of remedy and an operator as to whom the statute must be enforced. If Congress intended actions to be for wholly past violations, it could easily have drafted the second paragraph to provide jurisdiction to enforce standards, *or* an order administrative action *or* to apply civil penalties. It did not do so.

2. *Legislative History*

Amici suggest that Congress did not so draft because it never intended jurisdiction to lie for purely punitive action but only for cases involving the necessity of remedial action.

Congress understood that the jurisdictional predicate for a citizen suit was a discharge requiring enforcement by injunction in order that standards be attained and said so.

In the written words of Senator Boggs:

> "CITIZEN SUITS
>
> This bill creates a mechanism allowing private citizens to go to court to assure the attainment of pollution-control standards."

118 Cong. Rec. 33715 (1972).

In cases such as that presented here, the jurisdictional predicate to a citizen suit simply does not exist. Petitioners in a systematic program of correction culminating in outfall control under state-of-the-art technology achieved complete compliance with permit

2. *Amici* suggest plain meanings of words. Webster's defines "to enforce" as "to compel observance of; as to enforce the laws." [*Webster's Unabridged Dictionary*, 2d Ed. 1980]. Black's defines "enforce" as: "to put into execution; to cause to take effect; to make effective; as, to enforce a particular law . . . ; to compel obedience to." [Black's Law Dictionary, 5th Ed. (1979)].

Clearly, in a civil context, if one is observing and obeying the laws they need not be enforced as against him.

limitations. No exceedences have occurred for two and three-quarter years but one attributable to an Act of God. No injunction is necessary to compel Petitioners to meet the required standards. They have done so long since and did so prior to commencement of the instant action. The district court lacked subject matter jurisdiction.

C. Lower Court Errors

The object of the Act is clean water and compliance by dischargers with their permits. It is clear from statutory language and legislative history that citizen suits were intended to be grounded — as a jurisdictional matter — on the necessity of injuction required to abate violations and achieve compliance. [*See*, 33 U.S.C. §1319; Section 505; comments of Senators Boggs and Bayh at 118 Cong. Rec., 33715-33716].

Nevertheless, the Fourth Circuit below and various district courts have sought to find justification for allowing civil penalties for solely past violations. In doing so they have ignored the role Congress carefully crafted for citizen suits as an enforcement tool to force the achievement of compliance, and instead have elevated citizen suits to new levels under which achievement of compliance is rendered essentially irrelevant.

The conversion has been accomplished by assigning merely plausible constructions to language (791 F.2d, at 309) and by adopting presumptions and inversions of logic. For examples:

(a) The court below reasoned that "[a] significant deterrent would be lost if citizen suits seeking civil penalties for past violations were not permitted." The statement begged the issue in two respects. First, the issue is not whether civil penalties would ever be proper in a citizen suit. In a right case they would be. The issue is whether they are recoverable for wholly past violations after compliance has been achieved.

Second, the issue is not whether civil penalties are or are not a deterrent, in and of themselves, but whether

Congress intended them to apply after compliance has been achieved and enforcement by injunction rendered unnecessary.

(b) The court stated that "[w]hile it cannot be denied that citizens' enforcement authority is narrower than that of government — citizens, for example, obviously cannot seek criminal penalties or issue compliance orders — the Act does not deprive citizens of the right to sue for past violations." (791 F.2d, at 310).

Again the distinction between penalties in a right case and one where compliance has been achieved was ignored and the issue begged.

Moreover, the issue before the court was the scope of enforcement rights and powers established by the Act. The issue therefore was not whether the Act *deprives* citizens of a personal right to sue for wholly past violations but whether the Act *grants* such a right.

(c) Acknowledging the distinction between the threshold issue of jurisdiction and that of remedy, the court below completed its legislative task by inverting the concepts. The Fourth Circuit said:

> Gwaltney criticizes the logic of these [district court] opinions, arguing that they confuse the threshold issue of jurisdiction with the issue of penalties available once jurisdiction attaches and liability is found. Gwaltney contends that although the Act does provide for civil penalties, and even for penalties based on past violations, no relief whatsoever is available unless there is an ongoing violation on which to ground jurisdiction under section 505(a).
>
> There is some merit to this argument, because technically the issues of jurisdiction and penalties are analytically distinct. However, the Act's provision for civil penalties in citizen suits cannot be *totally ignored*. When read in conjunction with the Act's overall structure and its legislative history, it suggests strongly that citizens *should* be allowed to

seek civil penalties for past violations even in the absence of an ongoing violation. (791 F.2d, at 310, n.11) (emphasis supplied).

The Court reasoned that because penalties may be applied *if* jurisdiction attached, *therefore* jurisdiction attached.

The reasoning of the court below, and the district courts upon which it relied, demonstrate a predisposition to expansive interpretation of the citizen suit provisions and of the rights of citizen plaintiffs thereunder.

That predisposition, however, is at direct odds with the careful draftsmenship of the statute and of Congress' concern, almost to the point of preoccupation, that citizen suits be limited to injunction actions, *i.e.*, to situations in which injunctive enforcement is necessary to the achievement of compliance with the Act.

In situations such as that presented in the instant case, the factual predicates to such actions simply do not exist. Compliance has already been achieved.

III

Judicial Policy

The application in citizen suits of civil penalties for wholly past violations should be disallowed on two important grounds which may be viewed as statutory construction or sound judicial policy or both.

A. Motivation and Equity

In their statement of the issue *amici* ask whether Congress intended to empower citizens to punish plant operators who had achieved compliance by the application of diligence and state-of-the-art technology.

To support their suggestion that punishment *per se* as well as the desire to profit financially are significant motivations underlying at least some of these cases,

amici, as *amici curiae*, share with the Court salient portions of a recent memorandum of a group considering becoming plaintiffs in new cases.

> Polluters found liable are assessed penalties. (In the only case which wasn't settled, the court assessed a $1.28 Million penalty against a company on Chesapeake Bay.) These citizen suit provisions could be utilized by NYPIRG [New York Public Interest Research Group, Inc.] to punish polluters, gain publicity, steer a significant amount of money to worthwhile environmental projects, and conceivably, to bring money to NYPIRG in the form of legal fees to attorneys and scientific 'experts.'
>
> * * *
>
> [A plaintiff's environmental] law firm has brought approximately 26 suits under the Clean Water Act against 'direct dischargers' in New York and New Jersey (in fact, NJPIRG claims that the suits they file will provide a significant source of income for them) (*sic*), Friends of the Earth and Atlantic States Legal Foundation in New York.[3,4]

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3. NJPIRG is an acronym for New Jersey Public Interest Research Group a/k/a Student Public Interest Research Group.

4. *Cf., Atlantic States Legal Foundation v. Al Tech Specialty Steel Corp.*, 635 F. Supp. 284 (N.D.N.Y. 1986); *Friends of the Earth v. Archer Daniels Midland Co.*, No. 84 Civ. 413 (N.D.N.Y. 1986); *Friends of the Earth v. Consolidated Rail Corp.*, 768 F.2d 57 (Cir. 1985); *Friends of the Earth v. Facet Enterprises, Inc.*, 618 F.Supp. 532 (W.D.N.Y. 1984); *Student Public Interest Research Group v. AT&T Bell Laboratories*, 617 F.Supp. 1190 (D.N.J. 1985); *Student Public Interest Research Group v. Anchor Thread Co.*, 22 Env't. Rep. Cas. (BNA) 1150 (D.N.J. 1984); *Student Public Interest Research Group v. Georgia-Pacific Corp.*, 615 F.Supp. 1419 (D.N.J. 1985); *Student Public Interest Research Group v. Monsanto Co.*, 600 F. Supp. 1474 (D.N.J. 1985); *Student Public Interest Research Group v. National Starch and Chemical Corp.*, 23 Env't. Rep. Cas. (BNA) 1982 (D.N.J. 1985); *Student Public Interest Research Group v. P.D. Oil & Chemical Storage, Inc.*, 627 F.Supp. 1074 (D.N.J. 1986).

(Memorandum, Randall Weiner, Walter Hang and Alison Kelly to NYPIRG Executive Committee re Clean Water Act Citizens Suits, July 19, 1986).

As noted earlier, it is very clear from the legislative history of the Act, that Congress was very concerned that the enforcement tool of the citizen suit be used to enforce the act by injuction and that it not be used for the recovery of personal profits. (See remarks of Sens. Boggs and Bayh, 118 Cong. Rec. 33715-16).

The provision in fact, however, has been used for private gain, a result inconsistent with congressional intent. Furthermore, although Congress' goal is clean water, plaintiffs have used citizens suits to "punish" pollutors for the sake of punishment.

Amici urge that the Congress never contemplated, and this court should not sanction, citizen actions such as the instant case, which are inherently purely punitive and at least sometimes prompted by the desire for personal profit, against plant operators who have already expended all time, money, diligence, and expertise necessary to develop and install state of the art technologies and so to accomplish long term compliance. Such defendants stand not as polluters, but as persons who are in obedience to the law and who have attained all the environmental benefits of compliance.

B. Punishment of the Public

A plant operator such as Gwaltney who has attained long term compliance with the act will have done so by the expenditure of incremental costs and expenses and of a portion of overhead costs. Consumers will be obligated to pay such costs through higher prices.

Similarly, civil penalties would likewise ultimately be paid for by the consumer. The addition of substantial civil penalties in punishment of a compliance achiever would therefore operate as punishment of the consuming public without any environmental benefit.

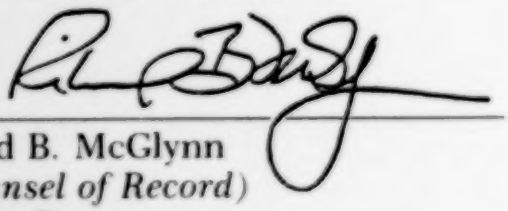
In enacting the Clean Water Act Congress was concerned with the accomplishment of environmental gain, not in punishing the public where no such gain results.

Amici urge that such a result be prohibited whether as a matter of statutory construction, or of sound judicial policy, or both.

Conclusion

For the foregoing reasons, *Amici* urge this Court to hold that district courts do not have jurisdiction under the Clean Water Act to apply civil penalties for wholly past permit violations under the Act.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Richard B. McGlynn, Counsel of Record for *amici curiae* Mid-Atlantic Legal Foundation, et al., certify that on the 26th day of March, 1987, I caused to be served copies of the attached motion and brief on the following:

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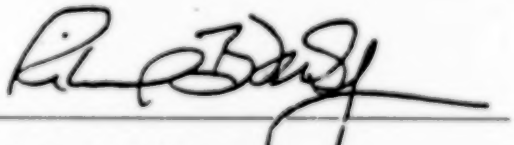

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